Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

CARLOS PRIETO

Petitioner

vs.

THE UNITED STATES of AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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30 PP

QUESTION PRESENTED FOR REVIEW

I

WHETHER A MOTIVE TO FABRICATE NECESSARILY ATTACHES UPON ARREST FOR PURPOSES OF DETERMINING THE ADMISSIBILITY OF A PRIOR CONSISTENT STATEMENT UNDER FEDERAL RULE OF EVIDENCE 801 (D)(1)(B).

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the following is a list of all parties to the proceedings who were not listed in the caption of the case:

Alexys Arredondo

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I

This case affords the Court the opportunity to address a clear conflict among the Circuit Courts of Appeals. The opinion of the Eleventh Circuit that a motive to fabricate does not necessarily attach upon arrest is in clear conflict with the opinions of the Second and Tenth Circuit Courts of Appeals, both of which adopt a per se rule

that a motive to fabricate necessarily and automatically attaches upon arrest. See United States vs. Forrester, 60 F.3d 52 (2nd Cir.1995); United States vs. Moreno, 94 F. 3d 1453 (10th Cir. 1996).

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OPINIONS BELOW

Petitioner seeks review of the opinion of the United States Court of Appeals for the Eleventh Circuit in United States vs. Prieto, reported at F.3d (11th Cir.2000) (See Appendix "A"). That opinion affirmed the Petitioner's conviction and sentence. The mandate of the Eleventh Circuit was issued on February 9, 2001. (Appendix "B").

STATEMENT OF JURISDICTION

This petition is filed within ninety days of February 9, 2001, the date of the issuance of the mandate of the Eleventh Circuit. The Court's jurisdiction is invoked under 28 U.S.C. subsection 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Rule 801(d)(1)(B) of the Federal Rules of Evidence which is set forth below:

Statements which are not hearsay. A statement is not hearsay if -

(1) **Prior statement by witness**. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

STATEMENT OF THE CASE

A. Course of Proceedings Below

On February 4, 1997, a third superseding indictment was filed in the Southern District of Florida charging the Petitioner with conspiracy to commit robbery, two counts of attempted robbery, and two counts of using a firearm during a crime of violence. The Petitioner was found guilty as charged in the indictment. On July 10, 1998, the Petitioner was sentenced to seventy eight months imprisonment on the conspiracy and attempted robbery counts of the indictment, with consecutive sixty and two hundred and forty month sentences as to the firearm counts of the indictment. His total sentence was three hundred and seventy eight months imprisonment.

B. Statement of the Facts

The facts herein are relatively simple. They relate to a conspiracy between the Petitioner, Rodolfo Palacios, and several other co-defendants to rob a U.P.S. truck carrying expensive computer equipment. The plan called for a car to block the path of the U.P.S. truck. Two of the conspirators would bind the driver of the truck with duct tape and replace him with another driver wearing an U.P.S. uniform. The truck would then be driven to an off load site where its contents would be transferred to a waiting van.

C. The Testimony of Rodolfo Palacios

Rodolfo Palacios was the master mind of the conspiracy. He was arrested on October 24, 1996. On the evening of his arrest he gave a statement to the police. Later,

in November of 1996, he signed a cooperation agreement with the Government. He eventually plead guilty in April of 1997.

Palacios was the star witness for the Government testifying extensively as to the Petitioner's involvement in the conspiracy. To bolster Palacios' testimony, the Government, over the strenuous objection of defense counsel, offered the testimony of Metro-Dade Police Detective Joseph Gross regarding prior consistent statements Palacios made on the evening of his arrest. Though Palacios' statements would ordinarily be inadmissible hearsay, the Government sought to introduce them to rebut a charge of recent fabrication pursuant to Federal Rule of Evidence 801(d)(1)(B). Rule 801(d)(1)(B) provides, in part, that a prior consistent statement is admissible to rebut a charge of recent fabrication or improper influence or motive. In Tome vs. United States, 513 U.S. 150, 157-58, 115 S.Ct. 696, 701, 130 L.Ed. 2d 754 (1995), this Court held that to be admissible pursuant to Rule 801(d)(1)(B), prior consistent statements must have been made before the alleged influence or motive to fabricate arose.

In order to decide the question of the admissibility of Palacios' prior consistent statement the trial judge heard argument concerning Palacios' motive to fabricate at the time of his statement to Detective Gross. The Government argued that although Palacios made the statement following arrest, it was given prior to any cooperation agreement between Palacios and the Government and thus there was no motive to fabricate. The defense argued that a person inevitably has a motive to cooperate to reduce the penalties against him immediately upon arrest.

Based on the examination of Detective Gross and another agent present on the night of Palacios' statement to Detective Gross, the District Court Judge ruled that Palacios'

prior consistent statements were admissible. The Eleventh Circuit's opinion affirmed the ruling of the District Court Judge holding that whether a statement is tinged with a motive to lie is a question of fact to be determined by the trial court on a case by case basis.

REASON FOR GRANTING THE WRIT

> This case affords the Court the opportunity to address a clear conflict among the Circuit Courts of Appeals. The opinion of the Eleventh Circuit that a motive to fabricate does not necessarily attach upon arrest is in clear conflict with the opinions of the Second and Tenth Circuit Courts of Appeals, both of which adopt a per se rule that a motive to fabricate necessarily and automatically attaches upon arrest. See United States vs. Forrester, 60 F.3d 52 (2nd Cir.1995); United States vs. Moreno, 94 F. 3d 1453 (10th Cir. 1996).

The Petitioner's conviction in this case rested primarily on the testimony of Rodolfo Palacios. Palacios' testimony was bolstered by the testimony of Detective Gross as to prior consistent statements Palacios made to him on the evening of his arrest. The District Court Judge admitted Detective Gross' testimony pursuant to Rule 801(d)(1)(B) of the Federal Rules of Evidence, on the basis that the statements pre-dated Palacios' motive to lie, i.e., his plea agreement with the Government. The Eleventh Circuit affirmed the District Court Judge's holding that whether a statement is tinged with motive to lie is a question of fact to be determined by the trial judge on a case by case basis.

The opinion of the Eleventh Circuit below directly conflicts with the opinions from both the Second and Tenth Circuit Courts of Appeals. In United States vs. Moreno, 94 F.3d 1453 (10th Cir.1996), the Tenth Circuit Court of Appeals was faced with this very same issue. In Moreno, Moreno's counsel extensively cross examined the Government's witnesses against Moreno about the plea agreements they had reached with the Government, implying that they had fabricated their testimony about Moreno's involvement in the case in order to secure a sentence reduction for themselves. In response, and over Moreno's objection, the Government presented the testimony of one of the witness' attorney's, that the witness had told him of Moreno's involvement in the case prior to his plea bargain. The trial court admitted the testimony of the witness' attorney as a prior consistent statement because the statement was made prior to the witness' plea bargain.

The Tenth Circuit Court of Appeals rejected the claim that the witness had no incentive to lie prior to his plea agreement. In holding the witness' testimony to be inadmissible, the Tenth Circuit recognized that the witness' motive to lie, leniency, existed as soon as he was arrested. In making this determination, the Tenth Circuit noted that Moreno's position was supported by the Second Circuit's decision in United States vs. Forrester, 60 F.3d, 52 (2nd Cir. 1995), which held that a testifying co-defendant's "motive to fabricate arose as soon as she was arrested and, therefore, her statement was inadmissible hearsay". Id., at 64.

As an increasing number of Federal prosecutions rest upon the testimony of "felon" witnesses hoping to obtain sentence reductions as a result of their "truthful" testimony, so too does the potential for abuse increase through the bolstering of their testimony by prior consistent statements.

Certiorari should be granted to resolve a clear conflict among the circuits on an issue affecting the integrity of a large number of Federal criminal trials.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that his Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 98-5169

D.C. Docket No. 96-00565 Cr LCN

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Versus

CARLOS ALBERTO PRIETO,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

November 6, 2000

Before TJOFLAT, MARCUS and BRIGHT*, Circuit Judges

MARCUS, Circuit Judge:[1]

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* Honorable Myron H. Bright, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

This appeal arises from the conviction of Defendant Carlos Alberto Prieto for crimes committed in connection with a conspiracy to rob a United Parcel Service (UPS) truck. Following a jury trial, Prieto was convicted of conspiracy to commit robbery, attemper robbery, and the use of a firearm during and in reflation to a crime of violence, in violation of 18 U.S.C. §1951(a), and 924(c)(1). Defendant attacks his convictions, alleging first that the district court abused its discretion in admitting the prior consistent statement of a witness made to a police officer following the witness' arrest, and second, that the district court erred in giving the Eleventh Circuit Pattern Jury Instruction regarding co-defendants' guilty pleas. Because we can discern no reversible error, we AFFIRM.

I

The relevant facts are straightforward. Beginning in May of 1996, and continuing until June 11, 1996, Prieto, Rodolfo Jose Palacios, and several other co-defendants engaged in a conspiracy to rob a UPS truck. Prieto and his co-conspirators had inside information that a certain UPS truck route carried expensive computer equipment, and they schemed to rob a truck running that route. According to their plan, one car would block the path of the UPS truck, and the driver and passengers would then exit the car and abduct the UPS driver at gunpoint. The driver's hands and feet would be bound with rope or duct tape, and a co-conspirator wearing a UPS uniform would replace ht driver. Disguised as a UPS employee, the co-conspirator would drive the truck to an off-loading site where the computer hardware would be removed.

Though the conspirators conducted several dry runs, the conspirators bungled their first attempted robbery, on June 4, 1996. Subsequently, there were problems with the van to

be used in the robbery, and one of the conspirators was arrested on other charges. Then on June 11, 196, the conspirators failed in their second attempted robbery. They successfully blocked the UPS truck with a Toyota a Corolla, but aborted the robbery after they observed a car approaching. The UPS truck contained items that had been shipped in interstate commerce, including two boxes of computer chips with a combined cash delivery value of over $60,000.00.

On February 4, 1997, a grand jury sitting in the Southern District of Florida returned an eight count indictment charging Prieto and nine co-defendants with various conspiracy, robbery and firearms charges arising from the two failed episodes. All co-defendants except for Prieto and two others pled guilty.[1] Prieto was charged with conspiracy to commit robbery, two counts of attempt to commit robbery, and two counts of using a firearm during a crime of violence. A jury found Prieto guilty as charged.\

II

A district court is granted broad discretion in determining the admissibility of a prior consistent statement under Fed. R.Evid. 801(d)(1)(B) and will not be reversed absent a clear showing of abuse of discretion. **See United States vs. Reed**, 887 F.2d 1398, 1405 (11th Cir.1989).

Where a party makes no objection in the trial court to the matter complained of on appeal, our review is for plain error. We find plain error only where (1) there is an error; (2) the error is plain; (3) the error affects the defendant's

---

One was convicted on several counts, and the other was acquitted on all charges.

substantial rights in that it was prejudicial and not harmless; and (4) the error seriously affects the fairness, integrity or public reputation of a judicial proceeding. See United States v. Olano, 507 U.S. 725, 730-32, 113 S.Ct. 1770, 1775-76, 123 L. Ed. 2d 508, 1993). We therefore review the district court's use of the Eleventh Circuit Pattern Jury Instruction for plain error.

A. Rule 801(d)(1)(B): Hearsay Exception

Palacios was arrested on October 24, 1996. He gave a statement on the evening of his arrest, signed a cooperation agreement with the Government in November of 1996, and ultimately pled guilty in April of 1997. Palacios became one of the Government's key witnesses against Prieto, testifying extensively concerning Prieto's involvement in the attempted UPS truck robberies. To bolster Palacios' testimony, the Government sought to offer the testimony of Metro-Dade Police Detective Joseph Gross, regarding prior consistent statements Palacios made on the evening of his arrest.

Thought Palacios' statements would ordinarily be inadmissible hearsay, the Government sought to introduce them to rebut a charge of recent fabrication pursuant to Rule 801(d)(1)(B). Rule 801(d)(1)(B) provides, in pertinent part, that a prior consistent statement be a witness is not hearsay if (1) the declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and (2) the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. Fed. R. Evid. 801(d)(1)(B). In Tome vs. United States, 513 U.S. 159,157-58, 115 S.Ct. 696, 701 130 L.Ed. 2d 574 (1995), the Supreme Court held that to be admissible pursuant to Rule 801(d)(1)(B), prior consistent statements

must have been made before the alleged influence or motive to fabricate arose.

The central question raised by this appeal is whether Palacios had a motive to fabricate in order to curry favor with the Government at the time he made his statements to Detective Gross. In order to decide this question, the trial judge heard argument outside the presence of the jury regarding whether Palacios had a motive to fabricate at the time of his statement to Detective Gross. The Government said that although Palacios made the statement following arrest, it was given prior to any cooperation agreement between Palacios and the Government and thus there was no motive to fabricate. The defense suggested, however, that a person inevitably has a motive to try to reduce the penalties against him through cooperation with the Government immediately upon arrest. The trial judge conducted an examination during which Agent Fabregas, who was present at Palacios' arrest and who brought him to F.B.I. headquarters, testified that the subject of cooperation was not raised with Palacios. Indeed, Detective Gross, who was present from the beginning of Palacios' interrogation, testified that to his knowledge, there had been no discussions with Palacios regarding the possibility of cooperation with the Government. Both witnesses unambiguously said that Palacios voluntarily began talking to the agents during the interrogation, and that he did not ask any questions about what benefits, if any, he might receive in exchange for his cooperation.

Based on the examination and the arguments heard regarding the relevant case law, the district court ruled that Palacios' prior consistent statements were admissible. We agree.

The trial judge was cautious and methodical in rendering the 801(d)(1)(B) ruling. She heard legal arguments from both sides and held a hearing in limine during which several agents testified as to the events that transpired from the time of Palacios' arrest, continuing through his interrogation. Her comments reflect thorough consideration:

> I read these cases that were cited yesterday in the record. And I think that it's been clear from the testimony that was taken that the statement clearly predated and (sic) the motive to fabricate or to obtain a better deal . . .
>
> But the record that he was given his Miranda rights, that is, Mr. Palacios. And then he started making statements to Agent Gross without asking anything to the extent of am I gonna get a deal or what's in it for me, or words to that effect.

Judge Nesbitt squarely found as a matter of fact that Palacios did not have a motive to fabricate at the time of his statements to Detective Gross.

Based on a review of this record, the district court's finding is not clearly erroneous. Therefore, the only way the district court could have abused its considerable discretion in admitting Palacios' prior consistent statements is if we hold, as a matter of law, that any post arrest statement is necessarily tinged with a motive to lie in order to curry favor with the Government. In essence, what the defense seeks is the creation of a bright line, per se rule barring the admission of any prior consistent statements made by a witness following arrest. We decline to adopt such a rule.

Whether a motive to fabricate attaches upon arrest

presents a matter of first impression to this Circuit. The only case in this Circuit to address the Supreme Court's holding in Tome is United States vs. Paradies, 98 F.3d 1266 (11th cir.1996), cert. denied, 521 U.S. 1106, 117 S.Ct. 2483, 138 L.Ed. 2d 992 (1997), which presents a very different set of facts. In Paradies, the parties conceded error where the district court, pursuant to Rule 801(d)(1)(B), admitted tape recorded conversations that had been recorded *after* one of the participants had agreed to cooperate with the Government. Id. at 1290. Indeed, both parties concede that a motive to fabricate would have arisen upon Palacios' arrest if he had inquired into, or been promised leniency if he cooperated. In this case, however, the uncontroverted testimony established and the district court found that Palacios made his prior consistent statements to Detective Gross *prior* to any discussion of cooperation or leniency. Because of this critical difference Paradies is inapposite.

Several courts have held that a motive to fabricate does not always and necessarily attach upon arrest, but rather that whether a statement is tinged with a motive to lie is a question of fact to be determined by the trial court according to the particular circumstances of each case. See United States vs. Roach, 164 F.3d 403,410 (8th Cir.1998), cert. denied sub nom.,Tail vs United States, 120 S.Ct. 117,145 L.Ed. 2d 99 (1999)(affirming admission of prior consistent statements made in a post arrest interview); United States vs. Tate, 1998 WL 637422 at *3 (4th Cir.1998)(unpublished table decision)(factual finding that admission of prior consistent statements made to police – pone prior to arrest, the day of arrest, and one two days after arrest – did not constitute plain error).

In United States vs. Fulford, 980 F.2d 1110 (7th Cir.1992), the Court affirmed the admission of prior consistent statements made be a witness under circumstances

similar to those in this case. In Fulford, the witness' prior consistent statements had to do with a co-conspirator's participation in the sale and distribution of methamphetamine. Following arrest, the witness was advised of his Miranda rights and he agreed to provide information to the arresting officers. Notably, the witness was not given any deal or other incentive to offer information, but was merely told that his cooperation would be brought to the attention of the United States Attorney. Subsequently, he pleaded guilty at his arraignment and only later entered into a cooperation agreement with the Government. As in this case, the defense argued that the witness fabricated post-arrest statements in the hope of receiving a lighter sentence in exchange for his cooperation. The Court rejected this argument on the ground that it could not "say that the district judge abused his discretion in allowing [the prior consistent statements] because reasonable minds can differ as to when [the witness] may have first possessed a motive to fabricate". Id. at 1114. Rather than attaching automatically upon arrest, the Court recognized that a judge could reasonably find that a motive to fabricate did not exist until the witness entered into the cooperation agreement with the Government. And in the instant case there was on inquiry or comment about cooperation at all.

We agree that statements made after arrest are not automatically and necessarily contaminated by a motive to fabricate in order to curry favor with the Government. To hold otherwise, as the defense urges us to do, would "effectively swallow[] the rule with respect to prior consistent statements made to Government officers: by definition such statements would never be prior to the event of apprehension or investigation by the Government which gave rise to motive to falsify". United States vs. Henderson, 717 F.2d 135,139 (4th Cir.1983).

Indeed, we recognize that a variety of motives may drive a person's decision to disgorge the details of a crime he has committed. For one, as this Court's predecessor recognized, a man's conduct is often controlled by his conscience. See United States v. Pulvano, 629 F.2d 1151, 1157 n.8 (5th Cir.1980)("As R.L. Stevenson phrased it: 'There's just one thing I cannot bear, and that's my conscience.')(quoting from Scots, IXV, My Conscience). For another, it is certainly true that "the world's great religions teach in one form or another that confession is good for the soul and that by making confession one may be absolved. . . .[T]o many people telling the truth and 'coming clean' satisfies a basic spiritual need of one who has transgressed and provides a measure of relief." United States ex. re. Williams v. Fay, 323 F.2d 65,72 (2nd Cir.1963). Confession may also be an emotional response triggered by feelings of remorse and sorrow. See Bryant v. Vose, 785 F.2d 364,368 (1st Cr.1986)(concluding that confession was triggered by sorrow and remorse rather than a desire for leniency). No doubt there are other motivators as well, including the desire to curry favor with law enforcement and obtain a more favorable outcome.

But given the complexity of the human psyche, we agree with the Fourth, Seventh and Eighth Circuits that whether a witness had a motive to fabricate when prior consistent statements were made is plainly a question of fact to be resolved by the trial court based precisely on the particular circumstances of an individual case. Quite simply, the trial court is in the best position to make that determination and its determination deserves great deference.

We are unpersuaded by the cases the defendant cites to the contrary. Defendant directs our attention to several

cases where courts have affirmed rulings that prior consistent statements made after arrest were inadmissible. The defense argues that based on these cases, we should find that motive to fabricate inevitably attaches upon arrest. These cases are for the post part distinguishable. In United States vs. Awon, 135 F.3d 96,100 (1st Cir.1998), the Court held that two bothers' statements were equally contaminated by a motive to fabricate when they first spoke with police as when they spoke with investigators only *after* the potential benefits of cooperation had already been discussed. Awon, 135 F.3d at 100. Here, the trial judge found that Palacios made his statements *before* any discussion of cooperation. The Court's holding in United States vs. Albers, 93 F.3d 1469, 1438 (10th Cir.1996), is similarly distinguishable. In Albers, one witness feared that all of the other conspirators would testify against him, and the other made his statements contemporaneously with his request that the Court appoint him a new lawyer and allow him to appeal his conviction. Here, in contrast, there was no evidence that Palacios either feared the testimony of the other conspirators or that he was attempting to curry favor with a trial judge.

United States vs. Collicott, 92 F.3d 973,978 (9th Cir.1996), on which Palacios also relies, actually supports the conclusion that the question of when a motive to fabricate attaches is a question of fact. In Collicott, the witness had been stoppled by police in her car, which contained drugs, when she made the prior consistent statement. Under a per se rule that motive to fabricate attaches upon arrest, her statements would have been admissible because they preceded arrest. However, based on the specific facts of the case (that is, being questioned by police while in possession of drugs), the court in Collicot determined that the witness' motive to fabricate arose *before* any arrest was made. Collicott thus supports a case-by-case factual inquiry into the

motives of the witness at the time of the prior consistent statement.

Finally, to the extent that United States vs. Moreno, 94 F.3d 1453, 1455 (10th Cir.1996), and United States vs. Forrester, 60 F.3d 52, 64 (2nd Cir.1995), may be read to stand for a bright line rule that motive to fabricate necessarily and automatically attaches upon arrest, we decline to adopt such a per se rule. As we have noted, the creation of such a bright line rule would swallow whole the 801(d)(1)(B) exception. See Henderson 717 F.2d at 139. Moreover, given the variety of motives that may influence an individual's decision to confess, we are convinced that the adoption of a per se rule mistakenly would take all discretion from the trial judge in a fact intensive context calling for just the opposite result – an individualized and careful calibration of complex fact. We therefore hold that whether a witness had a motive to fabricate when a prior consistent statement was made is a factual question properly decided by the district court and subject to reversal only for a clear abuse of discretion. Here, the trial court's unambiguous finding that Palacios did not have a motive to fabricate when he made his statements to Detective G4ross did not abuse that broad discretion.

B. Eleventh Circuit Pattern Jury Instruction

Prieto also argues that the district court committed plain error in using the Eleventh Circuit pattern jury instruction regarding co-defendants' guilty pleas. The court instructed the jury in these terms:

In this case, the Government has called as some if this witnesses people named as codefendants in the indictment with whom the Government has entered into a plea agreement providing for the possibility of a lesser sentence than the

witnesses would otherwise be exposed to. Such plea bargaining, as it is called, has been approved as lawful and proper, and it is expressly provided for in the rules of this Court. However, a witness who hopes to gain more favorable treatment may have a reason to make a false statement because the witness wants to strike a good bargain with the Government. So while a witness of this kind may be entirely truthful while testifying, you should consider such testimony with more caution than the testimony of other witnesses.

Of course, the mere fact that a witness has pled guilty to the crimes charged in the indictment is not evidence, *in and of itself* of the guilty of any other person.

Eleventh Circuit Pattern Jury Instruction 1.2 (emphasis added). Prieto argues that this instruction misadvised the jury that his codefendants' guilty pleas could be used as substantive evidence of his guilt if considered in conjunction with the other evidence in the case.

Prieto did not object to the use of this instruction at trial therefore acknowledges that our review is for plain error. See Fed.R.Crim.P. 52(b; 507 U.S. at 730-32; United States vs. Kramer, 73 F.3d 1067,1074 (11th Cir.1996).

Plain error is, by its terms, error which is so obvious and substantial that it should not have been permitted by the trial court even absent the defendant's timely assistance in detecting it. See United States vs. Martinez, 83 F.3d 371,376 (11th Cir.1996). For it to "plain", the error must either have been clear under the law at the time the error was made, or clearly contrary to the law at the time of the appeal. Mitchell, 146 F.3d at 1342-43 (citing Olano, 507 U.S. at 734). In United States vs. Abravaya, 616 F.2d 250,252 (5th Cir.1980), we considered the jury instruction in question and held that

the instruction was not error, plain or otherwise. Many other courts have approved accomplice instructions containing the "in and of itself" language of which Prieto complains. See United States vs. Gonzalez-Gonzalez, 136 F.3d 6 (1st Cir.1998), cert. denied, 524 U.S. 910,118 S.Ct. 2074, 141 L.Ed. 2d 150 (1998). We are satisfied that the district court did not commit any error, let alone plain error, in giving the Eleventh Circuit Pattern Jury Instruction and accordingly affirm.

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 98-5169

District Court Docket No.
96-00565 Cr LCN

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CARLOS ALBERTO PRIETO,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion, included herein by reference, is entered as the judgment of this Court.

Entered: November 6, 2000
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elain

Issued as Mandate: February 9, 2001
U.S. Court of Appeals, Atlanta, GA

No. 01-30

SUPREME COURT, U.S.
FILED
SEP 5 2001

In the Supreme Court of the United States

CARLOS PRIETO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Federal Rule of Evidence 801(d)(1)(B) provides that the prior statement of a testifying witness is not hearsay if it is consistent with the witness's trial testimony, and is offered to rebut a charge of recent fabrication of improper influence or motive. The question presented is whether Rule 801(d)(1)(B) establishes a per se rule that a prior statement is inadmissible to rebut charges of recent fabrication if the declarant was under arrest when the statement was made.

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In the Supreme Court of the United States

No. 01-30

CARLOS PRIETO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 232 F.3d 816. The opinion of the district court is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1b-2b) was entered on November 6, 2000. The petition for a writ of certiorari was untimely filed on May 10, 2001.[1]

[1] Petitioner states that his petition was "filed within ninety days of February 9, 2001, the date of the issuance of the mandate of the Eleventh Circuit." Pet. 1. Under this Court's Rules, however, "[t]he time to file a petition for a writ of certiorari runs from

Because no party filed a petition for rehearing in the court of appeals within ninety days of the entry of judgment, any petition for a writ of certiorari was due on February 4, 2001. See Sup. Ct. R. 13(1)-(3). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted on two counts of attempted interference with commerce by threats or violence and one count of conspiracy to interfere with commerce by threats or violence, in violation of 18 U.S.C. 1951(a), and on two counts of using or carrying a firearm during a crime of violence, in violation of 18 U.S.C. 924(c). He was sentenced to 378 months in prison. Pet. 2. The court of appeals affirmed.

1. In May of 1996, petitioner and several other individuals, including Rodolfo Palacios, conspired to rob a UPS truck carrying computer equipment that had been shipped in interstate commerce. Pet. App. 2a. According to their plan, two conspirators were supposed to block the truck's path and abduct the driver at gunpoint. Another conspirator, disguised as a UPS employee, would then drive the truck to an off-load site where the equipment could be transferred to another truck for future sale. *Ibid.*; Gov't C.A. Br. 8-9.

On June 4, 1996, two armed conspirators attempted to block the UPS truck, while petitioner and two others waited at the off-load site. The enterprise was aborted, however, when the would-be robbers failed to stop the truck. Gov't C.A. Br. 8-9. On June 11, two armed conspirators again tried to block the truck, while petitioner

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the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate[.]" Sup. Ct. R. 13(3).

and another conspirator waited at the off-load site. This time, the blocking conspirators succeeded in stopping the truck, and one brandished his weapon at the driver. The robbery was again aborted, however, when the conspirators observed a car approaching and fled. Pet. App. 3a.

On February 4, 1997, a grand jury in the Southern District of Florida indicted petitioner and his co-conspirators on two counts of attempted robbery and one count of conspiracy to commit robbery, in violation of 18 U.S.C. 1951(a), and two counts of using or carrying a firearm during a crime of violence, in violation of 18 U.S.C. 924(c). Pet. 2; Gov't C.A. Br. 1-2. Palacios pleaded guilty to these counts in April of 1997. Pet. App. 4a. Petitioner pleaded not guilty, and he went to trial with two co-defendants in September of 1999. Gov't C.A. Br. 2.

2. At trial, Palacios testified about petitioner's involvement in the conspiracy. Tr. 52-68. On cross-examination, attorneys for petitioner and each of his co-defendants attempted to impeach Palacios by use of his plea agreement, stressing repeatedly that Palacios had agreed to testify in exchange for potential reductions in his own criminal charges and sentence. Tr. 103-115, 151-158, 178, 180-194, 199-200, 234, 238-239.

The government subsequently sought to introduce testimony from a police officer describing a prior statement Palacios had made immediately after his arrest —a statement consistent with Palacios's trial testimony. Defense counsel objected on hearsay grounds, Tr. 885, and the government invoked Federal Rule of Evidence 801(d)(1)(B), which states that a prior statement is not hearsay if the declarant testifies and is subject to cross-examination at trial, and if the statement is "consistent with the declarant's testimony and

is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Fed. R. Evid. 801(d)(1)(B); Tr. 889. Without contesting that the proffered testimony satisfied Rule 801(d)(1)(B)'s textual requirements, defense counsel claimed that the evidence constituted hearsay under this Court's decision in *Tome* v. *United States*, 513 U.S. 150 (1995). *Tome* interpreted Rule 801(d)(1)(B) as having incorporated the common law rule "that a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence [is] admissible if the statement [was] made before the alleged fabrication, influence, or motive came into being, but * * * [is] inadmissible if made afterwards." *Id.* at 156.

As they had implied during Palacios's cross-examination, defense counsel argued to the district court that Palacios had a motive to fabricate before he made his statement, namely, a motive to exchange false cooperative assistance for prosecutorial leniency: "Any time defendants are arrested, the very first thing that they are told is * * * if you have any chance of trying to help yourself out, you know, now is the time to help us out. * * * And this kind of testimony is post-arrest testimony that is colored by [Palacios's] hopes of starting on the pattern of cooperation." Tr. 890. To establish that the alleged motive to fabricate existed at the time of Palacios's statement, defense counsel requested that the district court conduct, "outside the presence of the jury, a hearing to determine whether or not there [was] any discussion about his cooperation at this point in time." Tr. 895.

3. The district court acceded, and held an in limine hearing to determine whether Palacios's alleged motive to fabricate predated his October 24 statement, or

whether that motive arose only later in the investigation and pretrial negotiations. Tr. 906-934. The government offered testimony from an FBI agent who had observed and accompanied Palacios from the time of his arrest until the time his statement was taken. Tr. 923-932. The agent stated that no one had spoken to Palacios about any possible benefits of cooperating with the government. Tr. 924-925. Palacios had been told only that he was under arrest for "Hobbs Act robbery," and Palacios himself said nothing more than was required for his formal acceptance into custody. Tr. 927-928, 931-932. The agent further testified that, when Palacios gave his statement, he appeared "very remorseful, he was teary eyed. He just began and just started talking." Tr. 926. A police officer who had witnessed Palacios's statement also testified at the hearing; he stated that neither before nor during Palacios's statement did Palacios or any law enforcement agent mention possible cooperation with the government. Tr. 915-920.

The following day, after oral argument, the district court found "from the testimony that was taken that [Palacios's] statement clearly predated and [sic] the motive to fabricate or to obtain a better deal." Pet. App. 6a (quoting Tr. 953). Thus, the district court ruled that the proffered testimony was not hearsay under Rule 801(d)(1)(B), and constituted admissible evidence. Tr. 953. The jury convicted petitioner on all counts. Pet. App. 3a.

4. The Eleventh Circuit affirmed, holding that the district court had not abused its discretion in applying Rule 801(d)(1)(B). Pet. App. 4a-11a. The court of appeals determined that the district judge had "squarely found as a matter of fact that Palacios did not have a motive to fabricate at the time of his statement[]," and

the court found that conclusion not clearly erroneous. *Id.* at 6a.

The Eleventh Circuit also rejected petitioner's argument that Rule 801(d)(1)(B), as construed by *Tome*, *supra*, requires a per se rule against admitting prior statements made after the declarant has been arrested. Pet. App. 7a-11a. The Eleventh Circuit noted that several other courts of appeals had, contrary to petitioner's argument, deemed certain post-arrest statements admissible. The Eleventh Circuit further predicted that petitioner's theory, if adopted, would "effectively swallow[] the rule with respect to prior consistent statements made to Government officers: by definition such statements would never be prior to the event of apprehension or investigation by the Government which gave rise to motive to falsify." *Id.* at 8a (quoting *United States* v. *Henderson*, 717 F.2d 135, 139 (4th Cir. 1983) (court's alteration), cert. denied, 465 U.S. 1009 (1984)). "[G]iven the variety of motives that may influence an individual's decision to confess, we are convinced that * * * a *per se* rule mistakenly would take all discretion from the trial judge in a fact intensive context calling for just the opposite result—an individualized and careful calibration of complex fact." *Id.* at 11a.

ARGUMENT

The Eleventh Circuit's holding in this case does not conflict with that of any other court of appeals. The record supports the district court's factual finding that Palacios had no motive to fabricate at the time of his statement. Further review is not warranted.

1. Petitioner asserts that, in declining to find Palacios's post-arrest statement inadmissible, the Eleventh Circuit created a "clear conflict" (Pet. 5) over

whether Rule 801(d)(1)(B) requires courts conclusively to presume a motive to fabricate from the moment a declarant is placed under arrest. Contrary to petitioner's assertion, however, no court of appeals has adopted petitioner's per se rule regarding post-arrest statements. Indeed, no court of appeals has even discussed the argument except the Eleventh Circuit in this case. Rather, each court of appeals that has addressed such matters has resolved them on a contextual, fact-specific, case-by-case basis. Courts have deemed certain post-arrest statements admissible, see, *e.g.*, *United States* v. *Stoecker*, 215 F.3d 788, 791 (7th Cir. 2000), cert. denied, 121 S. Ct. 885 (2001); *United States* v. *Roach*, 164 F.3d 403, 411 (8th Cir. 1998), cert. denied, 528 U.S. 845 (1999); *United States* v. *Hill*, 91 F.3d 1064, 1071 (8th Cir. 1996), and other post-arrest statements inadmissible, see, *e.g.*, *United States* v. *Bao*, 189 F.3d 860, 864-865 (9th Cir. 1999); *United States* v. *Albers*, 93 F.3d 1469, 1483 (10th Cir. 1996).[2] But petitioner has not shown that the present range of cases requires intervention by this Court. Indeed, the current judicial authorities typify the gradual, common law jurisprudence implicitly endorsed in *Tome*: "We are aware that in some cases it may be difficult to ascertain when a particular fabrication, influence, or motive arose. Yet * * * a majority of common-law

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[2] See generally *United States* v. *Toney*, 161 F.3d 404, 408-409 (6th Cir. 1998) (noting that a district court's factual analysis in applying Rule 801(d)(1)(B) deserves significant deference), cert. denied, 526 U.S. 1045 (1999); *United States* v. *Ellis*, 121 F.3d 908, 920 n.16 (4th Cir. 1997), cert. denied, 522 U.S. 1068 (1998) (observing, without deciding, that post-arrest statements might not constitute hearsay, for the reasons discussed in *United States* v. *Henderson*, 717 F.2d 135, 138-139 (4th Cir. 1983), cert. denied, 465 U.S. 1009 (1984)).

courts were performing this task for well over a century, * * * and [there is] no evidence that those courts * * * have been unable to make the determination." *Tome*, 513 U.S. at 165-166.

The two cases petitioner relies upon are not to the contrary. In *United States* v. *Moreno*, 94 F.3d 1453 (10th Cir. 1996), the government sought to bolster testimony from an impeached witness, who said he had worked with the defendant in smuggling narcotics, by introducing a prior statement that the witness made to his lawyer in anticipation of a plea bargain. The Tenth Circuit held that the government's evidence was hearsay in that particular case, but it never addressed, much less decided, whether all post-arrest statements should be inadmissible.[3] *Id.* at 1455. Indeed, the court of appeals in *Moreno* upheld the conviction on harmless error grounds. *Id.* at 1455-1456.

Furthermore, the facts of *Moreno* differ significantly from those at issue here. Unlike Palacios, the witness in *Moreno* had already talked with his lawyer at the time of his statement, and it appears likely that the declarant and his co-conspirator had already been indicted. See *Moreno*, 94 F.3d at 1454 (explaining details of the investigation and the criminal allegations at stake). In this case, the record shows that Palacios's statement was made with virtually no information having been provided to him concerning the events or persons under government investigation. Tr. 924-932. Palacios had not been told that the investigation concerned attempted UPS robberies, he had not learned

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[3] On the contrary, the Tenth Circuit rejected an apparent per se rule imposed by the district court, which had refused to recognize any motive to fabricate until the declarant signed a plea agreement. See *Moreno*, 94 F.3d at 1455.

whether the government was investigating a conspiracy, and he had not been told any potential suspects' names. *Ibid.*

In the absence of such basic information about an ongoing criminal investigation's targets and status, it seems clear that witnesses would sometimes, perhaps even typically, possess no motive to fabricate. The more sensible motive under such circumstances might favor silence or truthfulness, since "cooperative" fabrications give cold comfort if they are eventually proved false. Cf. *United States* v. *Khan*, 821 F.2d 90, 94 (2d Cir. 1987) (noting that a witness does not always "enhance his chances for a cooperation agreement by making false accusations"). Thus, although the *Moreno* court suggested that the witness "had an incentive to concoct a story * * * as soon as he was arrested," 94 F.3d at 1455, the prior statement actually held inadmissible in that case was not taken immediately post-arrest, and the case did not involve a declarant who was uninformed about the criminal investigation underway.

The other case petitioner cites, *United States* v. *Forrester*, 60 F.3d 52 (2d Cir. 1995), similarly fails to demonstrate any "clear" or imminent circuit conflict. The Second Circuit in *Forrester*, like the Tenth Circuit in *Moreno* and the Eleventh Circuit here, declined to announce any per se rule regarding post-arrest statements. Indeed, *United States* v. *Khan*, 821 F.2d 90 (2d Cir. 1987), indicates that the Second Circuit has not accepted petitioner's proposed rule. *Khan* concerned a prior statement by an impeached government witness, Shahraiz Hussain Sheikh, who claimed he had sold drugs with the defendant. On appeal, the defendant claimed that Sheikh had a "motive to lie in order to obtain a cooperation agreement and reduce his own sentence." *Id.* at 94. The defendant also claimed that

Sheikh's motive to fabricate "arose the moment he was arrested, when his relationship with [the investigating] DEA Agent Gallo began and his initial debriefing took place." *Ibid.* The Second Circuit, applying the same common law rule later applied in *Tome*, rejected the defendant's argument: "We believe under the circumstances * * * that Sheikh was unlikely to enhance his chances for a cooperation agreement by making false accusations to Agent Gallo. Sheikh also had no apparent motive to falsely accuse Khan in particular, especially since he implicated Khan nearly three months prior to Khan's arrest. Thus, on balance, we are unpersuaded that Sheikh had a motive to lie * * * when he made the prior consistent statement." *Ibid.* (citation omitted). Similarly, in petitioner's case, testimony at the evidentiary hearing persuaded the district court that Palacios's alleged motive to lie did not, as a factual matter, exist at the time of his statement. Especially in light of *Khan*, petitioner's alleged conflict between the Second and Eleventh Circuits is not at all evident.

Moreover, the facts of *Forrester* are distinct from petitioner's case. *Forrester* involved the government's effort to bolster an impeached witness who claimed she had been the defendant's drug courier. 60 F.3d at 57-58, 64-65. The declarant's prior statement in that case was not a spontaneous oral declaration to the police, like Palacios's in this case. Instead, the statement in *Forrester* was a written document that the witness had prepared three weeks after her interview with a police officer. *Id.* at 64. The Second Circuit found that, in the context of the ongoing criminal investigation, the witness in *Forrester* possessed a motive to fabricate that clearly "existed before she drafted the contested statement." *Ibid.* And though the Second Circuit did

not list specific facts supporting its conclusion,[4] the court did suggest that the application of Rule 801(d)(1)(B) constitutes a fact-bound inquiry that should be based on the "trial record." *Ibid.* Furthermore, it is clear from the facts the Second Circuit did describe that *Forrester*'s result does not contradict the Eleventh Circuit's decision here. As in *Moreno*, the witness in *Forrester* had ample time to gather information about the government's investigation. Thus, unlike Palacios, she also had a significant opportunity to contrive a story implicating other suspects, with less risk that her story would be discovered as a fabrication.

In sum, the differences in outcome thus far reached by the courts of appeals reflect substantial variations in the facts that have been presented, and do not necessarily indicate any difference in the legal standards that the courts of appeals have applied. Further experience in the lower courts in additional factual contexts is needed before it can be ascertained whether this Court's intervention would be appropriate.

2. A particular aspect of this case, which further distinguishes *Moreno* and *Forrester*, counsels that it may be of limited utility as a vehicle for addressing the

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[4] Like *Moreno*, *Forrester* was a case whose application of Rule 801(d)(1)(B) was ancillary to its result. The Second Circuit's opinion primarily concerned two erroneous hearsay rulings, unrelated to Rule 801(d)(1)(B), regarding declarations by the complainant, Doris Rodriguez. 60 F.3d at 60-62. Those two errors, and not the district court's application of Rule 801(d)(1)(B), were the only express basis for the Second Circuit's decision to reverse. 60 F.3d at 64-65 ("In our view, the erroneously-admitted Rodriguez declarations are sufficient to require a new trial. * * * The errors with respect to * * * the prior consistent statement only exacerbated the undue prejudice created by the Rodriguez declarations.").

issues petitioner raises. As the Eleventh Circuit noted, the district court in this case based its ruling on an explicit factual finding that Palacios had no motive to fabricate at the time he made his statement. The standard for reviewing such an evidentiary ruling is abuse of discretion. See, *e.g.*, *United States* v. *Green*, 258 F.3d 683, 689 (7th Cir. 2001).

Of distinctive relevance is the context in which petitioner's claim was presented to the district court. During cross-examination, defense counsel repeatedly emphasized Palacios's motive to fabricate based on his plea agreement and his cooperation before and after signing that agreement. Tr. 103-115, 151-158, 178, 180-194, 199-200, 234, 238-239. Petitioner never asserted or suggested, during that cross-examination, that Palacios had a motive to lie before such cooperation began. Indeed, upon the government's proffer of Palacios's prior statement, the defense insisted, and obtained a hearing to attempt to prove, that Palacios had already begun to cooperate before he made his statement. Tr. 895, 906-934. Defense counsel did not suggest during the hearing, or at any other point during the trial, that Palacios had a motive to fabricate independent of discussions about cooperation. Neither the Tenth Circuit in *Moreno* nor the Second Circuit in *Forrester* confronted a comparably clear factual finding by a district court.

3. Finally, the Eleventh Circuit was correct to reject petitioner's proposed per se rule. As that court indicated, "a variety of motives may drive a person's decision to disgorge the details of a crime he has committed." Pet. App. 9a. Petitioner has offered no reason why a trial court should be required to assume that one of those potential motives—a hope for cooperation and leniency—inevitably exists. Moreover, a rule to

exclude all post-arrest statements for a testifying co-conspirator would sweep too broadly. For example, an innocent declarant arrested by mistake, or a declarant who was told that implicating others would not be rewarded, would have little or no apparent motive to fabricate. The magnitude and existence of such a motive, therefore, is highly dependent on context and particular facts. And, as the court of appeals pointed out, petitioner's proposed rule would render Rule 801(d)(1)(B) ineffective as applied to declarants who are implicated in the crime under investigation, because most such statements would arise after an arrest, or at least after a criminal investigation of the declarant had begun. *Id.* at 8a. Thus, even in cases like this one, where the district court found that no preexisting motive to fabricate existed, such a per se bar would deny the government and the fact finders use of prior statements that the principles of Rule 801(d)(1)(B) and *Tome*, *supra*, properly permit.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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